

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



# 76-1411

B  
PQS

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

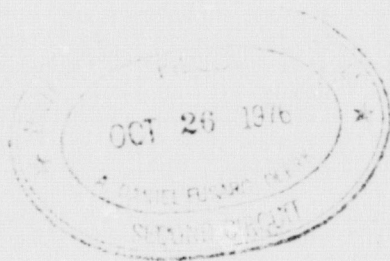
Plaintiff-appellant

-against-

SIMON C. TORIN

Defendant-appellee

APPEAL FROM THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA



BRADLEY J. DILLI

Attorney General

Office of the Attorney General

60 Court Street

Brooklyn, New York 11201

PAGINATION AS IN ORIGINAL COPY

# INDEX TO APPENDIX

	<u>PAGE</u>
Docket Entries of U.S. District Court	1-2
Information	3
Notice of Appearance dated 12/26/75	4
Notice of Appeal dated 9/3/76	5
Judgment and Committment of 12/19/75	6
Judgment and Committment of 8/27/76	7
Decision of Court of Appeals filed 6/14/76	8-15
Minutes of 12/19/75	16-24
Minutes of 8/27/76	25-47

CRIMINAL DOCKET

Assigned Trial  
MAGISTRATE

U.S. vs.

SUAT C. TORUN

2071

Disp. Sentence

75 CR 781

21-44(a)

Did possess a quantity of cocaine  
not pursuant to a valid prescription

U.S. Attorney General

Clayman

Harold I. Venokur, 16 Court St.  
Brooklyn, N.Y. (other city)  
237-1616

ARREST

INDICTMENT

ARRAIGNMENT

High Risk  
Date Design'd

10-23-75

Waived  
Supervising  
Indict/Info

1st Pled  
10-23-75  
Final Pled

Not Guilty  
Not Guilty  
Not Guilty  
Not Guilty

Not Guilty  
Not Guilty  
Not Guilty  
Not Guilty

Disposition

Convicted  
Acquitted  
Dismissed  
Noted/Discontinued

SENTENCE

Search	Issued	DATE	INITIAL/No.	INITIAL	APPEARANCE	INITIAL/No.	OUTCOME
Warrant	Return				PRELIMINARY EXAMINATION OR HEARING		Discharged Held for District CJ
Summons	Issued				Date Scheduled D to Held		Noted/Discontinued
	Expired				( ) Waived		
Arrest Warrant					( ) Not Waived		
COMPLAINT					( ) Intervening Indictment		
OFFENSE (In Complaint)					( )		

DATE

PROCEEDINGS

- 10-23-75 Information filed.
- 10-23-75 Before BARTELS J - case called - deft & counsel M. Venokur present - deft arraigned and having been advised of his rights by the court, including the Y.C.A. enters a plea of guilty as charged - sentence adjd without date - bail contd (p.r.)
- 10-23-75 Notice of Appearance filed.
- 12/19/75 Before BARTELS, J. - Case called - deft and counsel present in lieu of a definite term - deft sentenced to custody of Atty General for treatment and supervision pursuant to provisions of the Y.C.A., T-18, U.S.C. Sec. 5010(b), until discharged by the Youth Correction Division - deft to surrender on 1/2/76 at 10:00 A.M.
- 2/26/75 Notice of appeal filed (\$5.00-74756)
- 2/26/75 Docket entries and duplicate of notice of appeal mailed to court of appeals (\$5.00-74756)
- 2/26/75 Notice of appearance filed
- 12/31/75 Notice of motion for stay of execution of sentence filed
- 12/31/75 Before BARTELS, J. - Case called - deft and counsel present above motion argued and denied

OPPOSITE THE APPLICABLE DOCKET ENTRY IN SECTION IV, V, VI, VII, VIII, IX, X, Y, Z, ANY DOCUMENTS OF DELAY PER THE USE OF SECTION I, II, III, IV, V, VI, VII, VIII, IX, X, Y, Z, ANY DOCUMENTS OF

BEST COPY AVAILABLE

1-2/76 Certified copy of Judgment and Commitment ret'd and filed - def't delivered to MCC

1-14-76 Record on Appeal certified and mailed to the Court of Appeals.

1-19/76 Acknowledgment received from court of appeals for receipt of record

2-7-76 Order filed received from the Court of Appeals that the Index Record be docketed on or before 2-3-76

2-3-76 Stenographers transcript filed dated Dec. 19, 1975.

2-3-76 Supplemental index to Record on Appeal mailed to the Court of Appeals.

2-3-76 Stenographers transcript filed dated Dec. 19, 1975

2-11/76 Acknowledgment received from court of appeals for receipt of record

6-18-76 Petition for writ of habeas corpus & prosequendum filed. Writ issued.

9-30-76 Writ ret'd and filed - executed.

7-16/76 Stenographers transcript dtd 10/23/75 271 p.

7-30-76 Copy of Opinion and Mandate received from the Court of Appeals filed remanding action for further proceedings in accordance with the opinion of this court. (JM)

7/30/76 Before BARTELS, J - Case called. Def't & Counsel present. Adj'd to 8/27/76 at 9:30 a.m.

8-27-76 Before BARTELS, J - case called - def't & atty Trevor Headley present - On plea of guilty pursuant to 18:4216, ~~xxx~~ in lieu of a definite term, the def't is sentenced for treatment and supervision pursuant to 18:50100 of the Y.C.A. until discharged by the Youth Correction Division. This sentence is to run from the date of the original sentence.

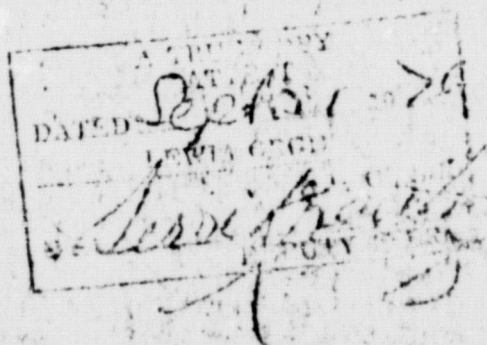
8-27-76 Judgment and commitment filed - certified copies to Marshal.

9-30-76 Record on appeal and supplemental index to record on 1 appeal received from the court of appeals - acknowledgment mailed to Clerk

9/1/76 Copy of satisfied writ and copies of Judgment & Commitment to MCC, NY this date to accompany def't to FCI, Petersburg, VA.

9/3/76 Notice of Appeal filed.

9/3/76 Docket entries and duplicate of Notice of Appeal sent to the Court of Appeals.



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

SUAT C. TORUM,

Defendant.

75 CR 781  
INFORMATION

FILED No.  
IN CLERK'S OFFICE, U.S.C., §844(a)  
U.S. DISTRICT COURT, N.Y.

OCT 23 1975

THE UNITED STATES ATTORNEY CHARGES:

On or about the 20th day of May 1974, within the Eastern District of New York, the defendant SUAT C. TORUM did knowingly and intentionally possess a quantity of cocaine, a Schedule II controlled substance, which possession was not pursuant to a valid prescription or order from a practitioner acting in the course of his professional practice and which possession was not authorized by any subchapter of the Narcotics Control Act of 1970. (Title 21, United States Code, Section 844(a)).

*David G. Tracy*  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

DEC 26 1975

NOTICE OF APPEARANCE

DOCKET NUMBER: 75-681

UNITED STATES OF AMERICA  
Plaintiff

against

Suat C. Trevor  
PLEASE PRINT NAME

Defendant

DATED: 12-26-75

DATE OF ARREST: 3-19-75

PLEASE TAKE NOTICE, that I have been retained by Suat C. Trevor, Defendant, above named, I was admitted to practice in this District on

SIGNATURE

Trevor L. A. D. & Co.

PLEASE PRINT YOUR NAME

Headley & Zetlin

OFFICE ADDRESS

61 Court St., Brooklyn

OFFICE TELEPHONE

596-6814

(If Defendant's Attorney is a Law Firm, indicate member thereof who is to try this case and whose professional engagements are to be considered in any application for adjournment.)

TREVOR HEADLEY

TO: U. S. ATTORNEY

Original to be filed in CLERK'S OFFICE

U.S. ORGEL  
CLERK

BEST COPY AVAILABLE

By: Deputy Clerk

DATE: 12-26-75

Docket Number

259

PARTELL, J.

(District Court Judge)

SOAT C. TORUN

NOTICE OF APPEAL

Notice is hereby given that

SOAT C. TORUN

appeals to

the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ Order ☐ other

(Specify) and sentence

entered in this action on

8-27-76

(Date)

Date  
To:

9-3-76

Address

Heath & Leith

(Counsel for Appellant)

66 Court Street

Brooklyn New York 11201

Phone Number

596 6814

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

QUESTIONNAIRE

- ☐ I am ordering a transcript  
☐ I am not ordering a transcript

Reason:

- ☐ Daily copy is available  
☐ U.S. Attorney has placed order  
☐ Other. Attach explanation

TRANSCRIPT ORDER

Prepare transcript of

☐ Pre-trial proceedings

☐ Trial

☒ Sentence 8-27-76

☐ Post-trial proceedings

DESCRIPTION OF PROCEEDINGS  
FOR WHICH TRANSCRIPT IS  
REQUIRED (INCLUDE DATE)

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (SRAP 10(b)) ☒ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

Heath & Leith

DATE

9-3-76

COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number  
of pages.

Date

Signature

(Court Reporter)

ORIGINAL

The undersigned, Clerk of the Court, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files of the Court.

FILED  
DEC 19 1975

THE COURT, upon the reading of the foregoing indictment, and the plea of the defendant, and the facts and circumstances of the case, and the defendant's waiver of assistance of counsel, do hereby find the defendant guilty of the crime charged in the indictment.

AND the Court, upon the reading of the foregoing indictment, and the plea of the defendant, and the facts and circumstances of the case, and the defendant's waiver of assistance of counsel, do hereby find the defendant guilty of the crime charged in the indictment.

(If not of counsel)

OFFICE OF THE CLERK  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE COURT, upon the reading of the foregoing indictment, and the plea of the defendant, and the facts and circumstances of the case, and the defendant's waiver of assistance of counsel, do hereby find the defendant guilty of the crime charged in the indictment.

NOT GUILTY

DEC 19 1975

being a finding/verdict of  
☐ NOT GUILTY. Defendant is discharged.  
☒ GUILTY.

TIME AM  
PM

Defendant has been convicted of each and of the offense(s) of violating T-21, U.S. Code, Sec. 864(a) in that on or about May 20, 1974, the defendant did knowingly and intentionally possess a quantity of cocaine, a Schedule II controlled substance, which possession was not pursuant to a valid prescription or order from a practitioner acting in the course of his professional practice and which possession was not authorized by an authorized person of the Marijuana Control Act of 1972.

The Court, upon the reading of the foregoing indictment, and the plea of the defendant, and the facts and circumstances of the case, and the defendant's waiver of assistance of counsel, do hereby find the defendant guilty of the crime charged in the indictment.

Defendant is ordered for treatment and supervision pursuant to the provisions of the Youth Corrections Act, Title 18, U.S. Code, Section 5010(b) until discharged by the Youth Corrections Division, defendant to surrender Jan. 2, 1976 at 10:00 A.M.

RECEIVED  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SPECIAL  
TREATMENT  
OR  
REHABILITATION

ADDITIONAL  
CONDITIONS  
OF  
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation, as set forth in the Federal Rules of Criminal Procedure, shall apply to the defendant. The Court may change the conditions of probation, reduce or extend the period of probation, or terminate the probation at any time during the probation period or within a maximum probation period of five years permitted by law, may extend or terminate probation for a month or longer by the probation period.

The court orders defendant to be placed in the custody of the Attorney General and recommends,

DEPARTMENT  
OF JUSTICE  
BUREAU

It is ordered that the defendant be placed in the custody of the Attorney General and recommended to the Attorney General for treatment and supervision pursuant to the provisions of the Youth Corrections Act, Title 18, U.S. Code, Section 5010(b) until discharged by the Youth Corrections Division, defendant to surrender Jan. 2, 1976 at 10:00 A.M.

SHAW, J. TORON

DOCKET

75-068781

8-27-1976

and, with the attorney for the plaintiff,  
were present in person on this date.

WITHOUT COUNSEL

10. After the court had read the indictment and asked whether defendant desired to plead guilty or not guilty, the court and the defendant agreed to proceed with the trial.

WITHOUT COUNSEL

TRAVIS, J. TORON

(Name of counsel)

11. GUILTY, and the court being satisfied that  
there is a factual basis for the plea,

INOLD CONFIDERE

IN T GUILTY

☐ NOT GUILTY. Defendant is discharged  
of all charges.  
☐ GUILTY.

Defendant has been convicted as charged of the offense of "Violating T-21, U.S.C. Code, Sec. 844(a) in that the defendant, did knowingly and intentionally possess a quantity of cocaine, a Schedule II controlled substance, which possession was not pursuant to a valid prescription or order from a practitioner acting in the good course of his professional practice and which possession was not authorized by a subchapter of the Controlled Substances Act of 1970."

On a finding of guilty, pursuant to the provisions of Title 18, U.S. Code, Sec. 3216, in lieu of a definite term, the defendant is sentenced for treatment and supervision pursuant to Title 18, U.S. Code, Sec. 3610(b) of the Youth Corrections Act, until discharge by the Youth Correction Division.

This sentence is to run from the date of the original sentence.

SENTENCE  
OF  
IMPRISONMENT  
ORDER

SPECIAL  
CONDITIONS  
OF  
PROBATION

ADDITIONAL  
CONDITIONS  
OF  
PROBATION

COMMITMENT  
TERMINATION  
ORDER

In addition to the special conditions of probation herein set forth, it is hereby ordered that the general conditions of probation, as set forth on the reverse side of this judgment, be observed by the defendant during the term of probation, reduced or extended by the court at any time during the probation period, and that a probation officer be appointed to supervise the defendant during the probation period.

Respectfully ordered and entered in open court of the Attorney General and recommended.

By the Court  
and the Clerk of the Court  
and the Attorney General

United States Court

SECOND CIRCUIT

FILED JUNE 11 1976

DANIEL P. SARO, CLERK

At a sitting Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of June, 1976, at the said nine hundred and seventy-six.

Present: **UNITED STATES OF AMERICA**  
**WILFRED FAIRBANKS**  
**MURRAY I. GURFEL**

Circuit Judges.

United States of America,

Plaintiff-Appellee

v.

JOSE G. TORUN,

Defendant-Appellant.

76-1055

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT, N.Y.

JUL 1976

TIME A.M. ....  
P.M. ....

Appeal from the United States District Court for the District of New York.

Eastern

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the action of said District Court be and it hereby is remanded for further proceedings in accordance with the opinion of this court.

BEST COPY AVAILABLE

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 929- September Term, 1975

(Argued April 21, 1976)

Decided June 21, 1976

Docket No. 76-1055

UNITED STATES OF AMERICA,

*Appellee,*

—against—

SEAN C. TORON,

*Appellant.*

Before:

MOORE, FEINBERG and GURFEIN,

*Circuit Judges.*

Appeal from sentence of 25 year old offender under Youth Corrections Act, 18 U.S.C. § 5010(b), by United States District Court for the Eastern District of New York, John B. Bartels, J., without specific finding that such treatment would benefit him. 18 U.S.C. § 4216.

Remanded for resentencing.

THEODORE HEADLEY, Brooklyn, N.Y. (Headley and Zetlin, on the brief), for *Appellant*,

PAUL B. BEGGMAN, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York; Charles E. Chayman, Assistant

Defendant-Appellant.

United States Attorney, on the brief, for  
appellee.

**Furman, Circuit Judge:**

Staff C. Toran appeals from a sentence under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b),<sup>1</sup> after his plea of guilty to an information charging him with possession of cocaine in violation of 21 U.S.C. § 844(a). The plea was taken in the United States District Court for the Eastern District of New York before John R. Bartels, J., who also imposed the sentence. The appeal is based upon the apparent anomaly that 21 U.S.C. § 844(a) provides for a maximum jail term of only one year, but because Toran was sentenced under the Federal Youth Corrections Act (FYCA) rather than as an adult he may be in prison for as much as four years, 18 U.S.C. § 5017(c). For reasons set forth below, we remand for resentencing.

**I**

Appellant argues that the sentence should be set aside because the judge improperly used the FYCA for punitive rather than for rehabilitative purposes and because the

<sup>1</sup> This statute provides:

If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter and discharged by the Division as provided in section 5017(c) of this chapter.

<sup>2</sup> This provision:

A youth offender committed under the authority of this chapter shall be released upon parole upon the expiration of the term of his sentence, or at such other time as the court may direct, and shall be subject to the provisions of the Federal Youth Corrections Act.

FYCA is unconstitutional since it leads to different treatment for some offenders, solely because of age, and denies them equal protection.

In support of his first proposition, appellant relies on *United States v. Hartford*, 489 F.2d 652 (5th Cir. 1973). The defendant in that case had also pleaded guilty to illegal possession of a controlled substance. In the course of the sentencing proceeding, the trial judge commented that a one-year prison term was insufficient. The judge therefore sentenced Hartford under the FYCA, which calls for an indeterminate sentence not to exceed four years. The Fifth Circuit reversed, holding that

the judge employed the FYCA in a manner repugnant to the ameliorative congressional purpose underlying the statute, namely to allow for correctional rehabilitation for youthful offenders, not to mete out retributive punishment. . . . Moreover, by opining that the legislatively-prescribed *maximum* penalty for this misdemeanor was insufficient punishment for Hartford, the court acted inconsistently with the authoritative determination by Congress with respect to the appropriate ranges of particular penalties. . . . Only by his dissatisfaction with the congressional remedial scheme embodied in the Drug Abuse Act did the court find grounds for its decision to set aside the sentence and remand for sentencing purposes. . . .

While we agree with these sentiments, appellant's reliance on *Hartford* is misplaced. Appellant argues that Judge Bartels' own learning that the defendant had a record was limited to be punitive. A careful reading of the transcript shows that this conclusion is simply not

unified. There is no basis in this record for believing that the judge was "utilizing" the FYCA "for punitive purposes."

Appellant's second argument is more troublesome. Appellant was 25 when he was convicted. He was therefore subject to sentencing under the FYCA only by reason of 18 U.S.C. § 4216. Had he been 26, the statute would not have applied, and he could have been sentenced only to the maximum prison term of one year for violating 21 U.S.C. § 841(a). The accident of age thus exposed Torum to the possibility of three additional years in jail. According to appellant, this denied him the equal protection of the law.

Despite the surface appeal of this argument, the FYCA has frequently been used against attacks of this sort. The theory has been that youths sentenced under the Act are given special rehabilitative treatment, which rationally justifies the difference in possible maximum sentences. See, e.g., *Abner v. United States*, 418 F.2d 288, 290 (5th

Cir. 1969), which held that the Parole Commission and Reorganization Act, Pub. L. No. 94-203, § 206, 90 Stat. 233 (March 10, 1976), was constitutional under 18 U.S.C. § 4216.

In the case of a defendant who has attained his twenty-first birthday but has not achieved his twenty-sixth birthday at the time of conviction, it is after taking into consideration the previous record of the defendant or his disposition in criminal matters, his social background, physical, mental and physical health, and such other factors as the court may deem pertinent, the court finds that there are reasonable grounds to believe that the defendant will continue to be a law-abiding citizen, the court may, in its discretion, suspend the sentence of the defendant or the Federal Youth Corrections Act, and the defendant may be employed pursuant to the provisions of the Act.

*United States v. Daniel*, 401 F.2d 1079, 1081 (5th Cir. 1968). The court in *Daniel* also cited *United States v. Daniel*, 401 F.2d 1079, 1081 (5th Cir. 1968), which held that the FYCA was not unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

*United States v. Daniel*, 401 F.2d 1079, 1081 (5th Cir. 1968); *United States v. Daniel*, 401 F.2d 1079, 1081 (5th Cir. 1968); *United States v. Daniel*, 401 F.2d 1079, 1081 (5th Cir. 1968). While we have not passed upon the point directly in *United States v. Daniel*, 406 F.2d 729 (21 Cir.), cert. denied, 394 U.S. 1019 (1969), we held that a sentence under the FYCA for a draft offender guilty of an offense with a five-year maximum was not cruel and unusual punishment. The per curiam opinion emphasized that the FYCA ameliorated the hardship which could result from imprisonment with ordinary criminals and instead made available the specialized and selective instruction for young offenders available pursuant to 18 U.S.C. § 5011.

Id. at 733. The court also noted that the FYCA allows a conviction to be expunged from a defendant's record. 18 U.S.C. § 5021, and permits conditional release at any time, 18 U.S.C. § 5017(a). Id.

Such considerations were given weight in the context of the possible five-year prison term for a defendant convicted to which Daniel was subject. They are not relevant to the issue for Torum, the hardest penalty as an offender could have been one year in jail as a draft offender. There are at least some doubt whether the FYCA is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *United States v. Daniel*, 401 F.2d 1079, 1081 (5th Cir. 1968). The court in *Daniel* also cited *United States v. Daniel*, 401 F.2d 1079, 1081 (5th Cir. 1968), which held that the FYCA was not unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

Parole Commission's sentences imposed under the FYCA. E.g., *Snyder v. United States Board of Parole*, 238 F. Supp. 1133 (D. Colo. 1974); *United States v. Norcome*, 375 F. Supp. 279, 274 n.3 (D.D.C. 1974). Since these guidelines rely on criteria other than individual rehabilitation in the institution, e.g., offense severity, they undermine a major justification for subjecting any youthful offender to a longer period of incarceration than an adult offender guilty of the same offense. And when the crime involved is a misdemeanor and the possible disparity, as it is here, is three years in prison, the weakening of the rehabilitative justification is most significant. Indeed, the importance of the change in parole policy under the guidelines can be seen in this very case. Judge Bartels in sentencing appellant told him that "It is an elastic sentence and all depends on him." In view of the way the parole guidelines are set up that appears to be no longer true, for the emphasis is more on the nature of the crime and the characteristics of the offender than on conduct in detention.

Thus, appellant's equal protection argument is a substantial one. Nevertheless, we have concluded that we do not yet have to face it because we must remand for resentencing in any event.

## II

Federal law provides special treatment for several classes of young offenders. Those under 18 are eligible for treatment as juvenile delinquents under 18 U.S.C. § 5031-37.

23-02117 (1974) 34 Crim. 101, 1019, 1980 (May 12, 1976). For discussion of parole guidelines, see *United States v. Snyder*, 238 F. Supp. 1133, 1137-38 (D. Colo. 1974); *United States v. Norcome*, 375 F. Supp. 279, 284 (D.D.C. 1974). For a discussion of the guidelines, see *United States v. Snyder*, 238 F. Supp. 1133, 1137-38 (D. Colo. 1974).

Defendants who are under the age of 22 are designated "youth offenders," 18 U.S.C. § 5006(d). A defendant who is 22 but is not yet 25 is called a "young adult offender," 18 U.S.C. § 4216.<sup>7</sup> The statute provides that for a youth offender, an FYCA sentence should presumptively be imposed unless the judge finds "that the youth offender will not benefit from treatment." 18 U.S.C. § 5010(d). On the other hand, for a young adult offender the statutory emphasis is precisely the reverse. 18 U.S.C. § 4216 provides that such offenders may be sentenced under the FYCA only if

after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the . . . Act. . . .

In *Dorsey v. United States*, 418 U.S. 424 (1974), the Court held that the finding of no benefit for a youth offender must be explicit, not merely implied. The Court stated:

The question whether the finding of "no benefit" must be explicit or whether it may be implied in the record of a particular case is answered by the manifest desire of Congress to assure that treatment under the Act be considered by the court as one option whenever a youth offender is eligible for it.

418 U.S. at 443. Similarly, we believe that the offenders of ages 22-25 inclusive, the congressional view was that generally such persons will not benefit from special treatment

<sup>7</sup> Formerly § 5006(e).

<sup>8</sup> See note 4 *supra*.

as nonadults. See *United States v. Kayler*, 491 F.2d 1133, 1137 (2d Cir.) (en banc), vacated and remanded on other grounds sub nom. *United States v. Hopkins*, 418 U.S. 909 (1974). For this reason, the statute authorizes imposition of an FYCA sentence on a young adult offender only "if the court finds that there are reasonable grounds to believe that [he] will benefit from the treatment provided under the Federal Youth Corrections Act." While we have not previously held that such findings must be express, we implied as much in *United States v. Kaylor*, supra, 491 F.2d 1137, in which we said that Congress "meant to permit such treatment [under the FYCA] only after affirmative findings in the case of young adult offenders." (Emphasis removed.) As Justice Marshall has noted, "this is precisely the 'obverse' of the finding of 'no benefit' required for youth offenders." *Porczeniski v. United States*, supra, 418 U.S. at 451 n.13 (concurring opinion). See also *United States v. Waters*, 437 F.2d 722, 723-24 (D.C. Cir. 1970). Moreover, such a requirement is consistent with the legislative history of the young adult offender statute, which stresses that FYCA treatment of such offenders should be extended "in exceptional cases" and indicates that Congress contemplated that the Youth Act may be applicable to an offender in the slightly older age group only when the court makes a special finding that the defendant would benefit by the treatment methods prescribed by that act.

S. Rep. No. 5013, 85th Cong., 2d Sess., 2 U.S. Code Cong. & Admin. News 3864, 3893 (1954).

The Government cites *United States v. Cruz*, 523 F.2d 473 (9th Cir. 1975), and *United States v. Smith*, 501 F.2d 1259 (2d Cir. 1974), to support its position that a young adult offender may be treated as a youth offender under the FYCA.

an explicit finding of benefit. Neither supports that view. *Cruz* holds that a finding of no benefit is not required before such an offender can be sentenced as an adult; *Smith* reversed an adult sentence for a 25-year old defendant because the sentencing judge's comments were "susceptible of the meaning that only a specific class of persons [the underprivileged] can claim consideration under the Act." 500 F.2d at 1352. Thus neither case dealt with an objection to FYCA treatment by a young adult offender.

In the instant case, it is clear from the record that Torun was 25 at the time of conviction and therefore was a young adult offender. Accordingly, the judge could not apply the FYCA to Torun unless he made an express finding that Torun would benefit from such treatment. No such finding appears in the record. Although there was a casual reference by Judge Bartels to the fact that the defendant might study recycling while in custody, the judge did not expressly find that the defendant would benefit from treatment. The Government argues that the very act of sentencing a young adult offender under the FYCA is an implicit finding. As indicated above, however, the finding should be explicit, as Congress apparently intended, particularly in a case where the maximum sentence imposed is far longer than the maximum sentence for an adult for the same offense.

Accordingly, we case must be remanded to the district court for resentencing. Since defendant has been incarcerated while his appeal has been pending, expedition is called for, particularly since the district judge in reconsideration may decide to sentence defendant as an adult with a possible maximum prison term of only one year.

Case remanded for resentencing.

Defendant claimed to be in this business.

MOORE, Circuit Judge (concurring):

In my opinion, the defect in sentencing here lies in the absence of the statutory prerequisites to a sentence imposed under the Federal Youth Corrections Act, namely, whether "there are reasonable grounds to believe that the defendant will benefit from the treatment provided [thereunder] . . ." Since the judge could not apply the FYCA to Torun unless he made an express finding that Torun would benefit from such treatment, the case must be remanded for resentencing. If no such finding can properly be made on remand, Torun cannot be sentenced under the FYCA and must be sentenced as an adult under 21 U.S.C. §84(a) (maximum jail term one year).

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 -----X  
4 UNITED STATES OF AMERICA :

5 -against- :

75 CR 781

6 SUAT CILHAN TORUN, :

7 Defendant. :

8 -----X  
9  
10  
11  
12  
13  
14 CRIMINAL CAUSE FOR SENTENCING

United States Courthouse  
Brooklyn, New York

December 19, 1975  
9:30 a.m.

15  
16 B e f o r e :

17 HONORABLE JOHN R. BARTLES, U.S.D.J.  
18  
19  
20  
21  
22

23 MICHAEL PICOZZI  
24 OFFICIAL COURT REPORTER  
25

1 THE COURT: Saat Cihan Torun, before imposing  
2 sentence on you, do you have anything to say in  
3 mitigation of sentence?

4 THE DEFENDANT: I would like to have my attorney  
5 explain.

6 THE COURT: Mr. Venokur.

7 MR. VENOKUR: Yes, your Honor. Before I start  
8 I would like to state that Mr. Torun's father and  
9 mother and brother are in court on his behalf and are  
10 available for any questions you may have as to his  
11 family background.

12 I have read the Pre-Sentence Report. Substan-  
13 tially it is just as my client has informed me. There  
14 are one or two points I would like to elaborate on.  
15 My client informs me that the Federal Probation Officer  
16 was supposed to have gotten a letter from his employer.

17 When was that letter sent?

18 THE DEFENDANT: I believe two weeks ago.

19 MR. VENOKUR: If you haven't gotten it, we will  
20 proceed without it.

21 THE COURT: I don't have it in the file.

22 MR. VENOKUR: If you desire to see it -- well,  
23 have you seen a copy of it?

24 THE DEFENDANT: Yes. It states that I am work-  
25 ing for this person, this company.

THE COURT: What kind of work is it?

1  
2 THE DEFENDANT: I am a supervisor in a plant,  
3 a plastic recycling plant in Brooklyn.

4 MR. VEEHUR: It does mention his employment  
5 in there.

6 In addition, there are a couple of matters  
7 mentioned in the report, one refers to the lack of  
8 a W-2 form or current withholding with reference to  
9 his corporate withholdings and I asked the defendant  
10 about that and he has been negotiating for some  
11 months relative to taking over and becoming a partner  
12 in the business. It's not considered quite as an  
13 employee and he doesn't pay taxes --

14 THE COURT: The report indicates he was employed  
15 off the books. Do you know what that means? That's  
16 an effort on the part of the employer and the employee  
17 not to pay taxes.

18 MR. VEEHUR: That's why I mentioned that he is  
19 negotiating -- he can explain further about the  
20 negotiations -- he is supposed to be buying the plant.

21 THE DEFENDANT: There was also an agreement  
22 submitted to the Probation Officer saying I will in  
23 turn become a partner after a period of time, if the  
24 employer thinks I am worthy of taking over.

25 THE COURT: I will listen.

1 MR. VENOKUR: There was talk in there about his  
2 endeavors to cooperate with the Federal Government  
3 and the Probation Report does state that, but I  
4 discussed it with Mr. Torun at length and I've come  
5 to the conclusion and he agrees with me that the way  
6 we went about it was a stupid way but the report does  
7 state he did talk about various people he knows and  
8 all that.

9 He explained to me -- trying to impress upon  
10 the undercover agent, not knowing who he was that he  
11 was a big dealer in narcotics. He would further his  
12 cooperation regarding the weapons -- he had been  
13 working with an agent Curran who is in Buffalo and he  
14 called the agent and asked him to write a letter and  
15 Agent Curran does not desire to do so.

16 In any case, he did try to cooperate and as the  
17 report states, because he was under State probation,  
18 that cooperation could not be consummated.

19 Apparently there are rules objecting to coopera-  
20 tion where a person cannot work with Federal Agents  
21 while under State probation.

22 THE COURT: He has a record.

23 MR. VENOKUR: He has that one case, your Honor,  
24 where he is on the State Probation and has two dismissals.

25 THE COURT: I think in the Criminal Court of the

1 City of New York dismissals are routine and expected.  
2 It's a mere matter of form there.

3 MR. VENOKUR: Well, I practice before that  
4 Court --

5 THE COURT: You know.

6 MR. VENOKUR: I don't find that. I have many  
7 cases that are not dismissed. I don't say it proudly.  
8 I would like to say it is on the merits --

9 THE COURT: Yes, indeed. I know what goes  
10 on in the Criminal Court of the City of New York, it's  
11 what they call the revolving door. And that door gets  
12 around pretty fast.

13 MR. VENOKUR: I hope that is not a factor.

14 THE COURT: Has nothing at all to do with my  
15 decision. Every report I read where there is a record,  
16 it is the same story, it's nothing new with him at all.

17 MR. VENOKUR: He does have a conviction.

18 THE COURT: I looked at his case on the merits.

19 MR. VENOKUR: I appreciate that.

20 THE COURT: When you are dealing with cocaine  
21 and drugs you are dealing with a serious thing. It's  
22 up to the Court to see that the law is enforced. I  
23 am ready to impose sentence. I must say to you, as I  
24 said to others, this isn't a case where the Court steps  
25 up on the bench without having a conference beforehand,

1 we've had a conference on this case. We had recommen-  
2 dations. We have a pre-sentence panel.

3 MR. VENDORF: You had a conference?

4 THE COURT: Not with you.

5 MR. VENDORF: I was wondering. In the State  
6 Court we sometimes have pre-sentence conferences.

7 THE COURT: You keep on talking and you will  
8 prove my point about what I said of the State process.

9 Have you anything more to say?

10 MR. VENDORF: I want to add that he mentioned  
11 a moment ago he has been negotiating to take over the  
12 business.

13 THE COURT: What kind of business is it?

14 MR. VENDORF: It's a recycling factory.

15 THE COURT: Recycling?

16 THE DEFENDANT: Plastic recycling business.

17 MR. VENDORF: He has been working as a super-  
18 visor and they have confidence in him and they are  
19 willing to give him all or part of the business through  
20 an arrangement.

21 I would, your Honor, beg of you if you can  
22 possibly have him remain out of custody and be able  
23 to proceed and make his way in society, I feel that  
24 he has made his mistake and appreciates that fact  
25 and it's not going to re-occur.

1 THE COURT: Sust Cihan Torun, on your plea of  
2 guilty to the one count of information 75 CR 781, in  
3 lieu of a definite term, I sentence you to the custody  
4 of the Attorney General for treatment and supervision  
5 pursuant to the provisions of the Youth Corrections  
6 Act, Section 5010(b) of Title 18, United States Code,  
7 until discharged by the Youth Corrections Division.

8 Next case.

9 MR. VENOKUR: Immediately?

10 THE COURT: All sentences are immediate.

11 MR. VENOKUR: I was going to ask the time.

12 I would like to have some time for him to settle his  
13 affairs.

14 THE COURT: How much time?

15 MR. VENOKUR: How long will you need, a week?

16 THE DEFENDANT: At least a week after next year.

17 THE COURT: January 2nd.

18 I think I explained what the Youth Corrections  
19 Act provides for at the time I took his plea. He may  
20 be able to increase his knowledge of recycling there.  
21 It's not a straight sentence. They have provisions  
22 for youths and if he does the right thing it's pos-  
23 sible, and I don't make any promises, that an appli-  
24 cation can be made to see that the offense is erased.

25 I know under one sentence of the Youth Correc-

1 tions Act it is, but whether it is true under 5010(b),  
2 I am not sure. It is an elastic sentence and all  
3 depends on him.

4 Next case.

5 THE PROBATION OFFICER: Was there a time set?

6 THE COURT: January 2, 10 o'clock, to surren-  
7 der.

8 (Whereupon, the proceedings were concluded.)

9 \* \* \*

1  
2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF NEW YORK

4 -----x  
5 UNITED STATES OF AMERICA, :

6 -against- : 75-CR-781

7 SUAT CIHAN TORUN, :

8 Defendant. :

9 -----x

10  
11 United States Courthouse  
12 Brooklyn, New York

13 August 27, 1976  
14 9:30 o'clock A.M.

15 B e f o r e :

16 HONORABLE JOHN R. BARTELS, U.S.D.J.  
17

18 I hereby certify that the foregoing is  
19 a true and accurate transcript from my  
20 stenographic notes in this proceeding.

21 *Perry Auerbach*  
22 Official Court Reporter  
23 U. S. District Court

24 PERRY AUERBACH  
25 ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID C. TRAGER, ESQ.  
United States Attorney  
for the Eastern District of New York

BY: CHARLES CLAYMAN, ESQ.  
Assistant U.S. Attorney

TREVOR HEADLEY, ESQ.  
66 Court St.  
Attorney for Defendant

Also present:

JAMES STEIN, ESQ.  
-and-  
STEPHEN RACKMILL, ESQ.  
Probation Department

1 THE CLERK: Criminal Cause for Sentencing, 3  
2 United States of America vs. Suat Torun.

3 THE COURT: Why don't you sit down and let me  
4 read these letters first.

5 MR. HEADLEY: Do you have any copy? Are we  
6 talking about the probation report?

7 THE COURT: What are these letters about? It's  
8 his letter. He signed it. You must have a copy of it.

9 MR. HEADLEY: Yes, I do have a copy of it, Your  
10 Honor.

11 THE COURT: I haven't read this letter. You  
12 gentlemen better sit down until I read this letter. I  
13 will have to take an adjournment of a half hour.

14 MR. HEADLEY: Fine.

15 (Whereupon, a recess was taken at 10:10 o'clock  
16 A.M.)

17 (Whereupon, Court was resumed at 10:25 A.M.)

18 THE CLERK: Criminal Cause for Sentence, United  
19 States vs. Suat Torun.

20 MR. HEADLEY: Your Honor, I understand this is  
21 a Progress Report from Virginia, which I haven't seen.

22 THE COURT: That's right. You haven't seen it,  
23 and I just got it myself, so you will see it. You  
24 will also see the other Probation Report, because I  
25 asked the Probation Department to give me another Pro-

BEST COPY AVAILABLE

4  
1 bation report on Suat Torun. You read his letter  
2 to Mr. Sacks; haven't you?

3 MR. HEADLEY: YES, Your Honor.

4 There was a memorandum that I saw.

5 THE COURT: Sit down over there and read it, and  
6 I will stay here and talk to Mr. Claymen.

7 (Whereupon, the defense counsel read the report.)

8 THE COURT: All right, very well.

9 Now, before imposing sentence upon you, Mr.  
10 Suat Torun, do you have anything to say in your behalf  
11 in explanation of the offenses or in mitigation of the  
12 sentence about to be imposed? I know that since you have  
13 obtained an adjournment you have written a letter to Mr. Sacks  
14 of the Probation Department, which I have read.

15 Let's have the papers, Stewart?

16 DEFENDANT TORUN: Your Honor, I would like to have  
17 my attorney speak for me.

18 (Whereupon, the Clerk handed up the papers to the  
19 Court.)

20 THE COURT: I have also read the report, Second  
21 Report of the Probation Department, inasmuch as it was  
22 adjourned, I adjourned the case, and in view of the  
23 Court of Appeals decision, I thought I ought to get a  
24 second report from the Probation Department, and at  
25 that time the Probation Department must have obtained

1 from the Bureau of Prisons, the progress report of 5  
2 defendant; is that right?

3 MR. STEIN: That's correct, Your Honor.

4 THE COURT: I will put that in the record as part  
5 of the case.

6 Now, then you want your attorney to speak for you?

7 DEFENDANT TORUN: Yes, sir.

8 THE COURT: All right, I will listen.

9 MR. HEADLEY: The defendant pleaded guilty to  
10 a one count information which charged that on May 20th,  
11 1974, the defendant unlawfully possessed a quantity of  
12 cocaine.

13 The agents involved in the case advised that the  
14 defendant's involvement in the case, was of a solitary  
15 nature. Page 7 of the Probation Report.

16 THE COURT: Yes. All right. Go ahead.

17 MR. HEADLEY: The defendant was born on June 28,  
18 1950, and has attained the age of 26.

19 The defendant, Torun, attended College in Fort  
20 Lauderdale from September of 1970 until January of  
21 1972, having completed one and one half years of  
22 college. The defendant, during the period of his  
23 incarceration passed the initials S.A. . and enrolled  
24 for the September term of the College Program that was  
25 available. The defendant prior to his incarceration

1           resided with his parents in a middle class home in 6  
2           Forest Hills.

3           The Probation Report indicates that his brother  
4           was convicted for bank robbery. I submit it was error  
5           to include this item in the report because of the pre-  
6           judice that would result.

7           The defendant's educational background also  
8           includes attendance at Rhodes, a private school in  
9           Manhattan, from 1964 until 1967.

10          Mr. Torun at the time of his sentence was run-  
11          ning a recycling business at 314 Elton Street in Brooklyn.

12          Mr. Torun has been incarcerated at the Federal  
13          Corrections Institute in Petersburg, Virginia. Mr. Torun  
14          took all available tests including the S.A.T. The only  
15          college level courses available were ones that he had  
16          already taken at Ft. Lauderdale. His duties while  
17          incarcerated have been working in leathercraft as a  
18          hobby, and being an orderly, cleaning the hallways.  
19          Vocational Programs are available, such as barbering,  
20          welding and cable shop. There are no recycling courses  
21          available, recycling being the business Mr. Torun was  
22          engaged in prior to incarceration.

23          In March, the Parole Board indicated that accord-  
24          ing to the guidelines set down for the severity of the  
25          crime, he would not be eligible for parole from between

1 27 to 32 months.

2 The defendant does come into contact with some  
3 prisoners, over age 26, and older prisoners, are now  
4 becoming part of the institution as the institution  
5 has become the Federal Correction Institute.

6 All persons there other than the defendant are  
7 felons, and the defendant has not during this period of  
8 incarceration come into contact with any other person  
9 who has been convicted of a misdemeanor.

10 THE COURT: It is not a misdemeanor?

11 MR. HEADLEY: Yes, your Honor. The defendant --

12 THE COURT: Yes, it is.

13 He pled guilty to one count of the information  
14 which stated that he unlawfully possessed a quantity  
15 of cocaine which was a schedule 2 controlled substance,  
16 which possession was not pursuant to a valid prescription  
17 or order from a practitioner acting in the same course  
18 of his professional practice and which possession was  
19 not authorized by a subchapter of the Narcotics Control  
20 Act of 1970.

21 However, the plea was a result of a bargain with  
22 the United States Attorney's Office. In actuality, accord-  
23 ing to the report, there was an actual -- as I recall  
24 -- sale of cocaine; isn't that true, Mr. Clayman?

25 MR. CLAYMAN: That is correct, your Honor.

THE COURT: Sure. Go ahead.

MR. HEADLEY: During the period of his  
incarceration the defendant comes into the --

1 THE COURT: Well, I know -- well, I don't know.  
2 They would know. Mr. Rackmill, do you know what's going  
3 on with the felons or who they come in contact with.  
4 They're all supposed to be those who have been sent to  
5 incarceration under the Youth Correction Act; isn't  
6 that true?

7 MR. RACKMILL: The majority of the offenders,  
8 to my knowledge, that are in Petersburg are Youth  
9 Offenders who were sent there pursuant to the Youth  
10 Corrections Act.

11 THE COURT: When you talk about the Youthful  
12 felons, of course, that is an overall accusation which  
13 could include those who have only been charged with  
14 misdemeanor. As a matter of fact, even though they may  
15 be felons, they are misdemeanants as a result of a  
16 bargain with the United States Attorney's Office, just  
17 as this defendant is.

18 So go ahead.

19 MR. HEADLEY: Defendant has come into daily  
20 contact with persons who are serving multiple life  
21 sentences and serving 15 and 20 year terms for  
22 bankrobbery and other violent crimes.

23 THE COURT: What do you know of that?

24 MR. RACKMILL: There are provisions in the  
25 Youths Corrections Act where an individual who is

1 convicted of a bankrobbery, hypothetically, could be  
2 5010(c) hypothetically, so he would then be designated  
3 to the institution like Petersburg.  
4

5 THE COURT: But he is a youth offender.

6 MR. RACKMILL: That's right, Judge.

7 THE COURT: All right.

8 MR. HEADLEY: It is my understanding that there  
9 are no parole guidelines for persons convicted of  
10 misdemeanors, and his misdemeanor conviction with  
11 respect to his parole is to be determined along with  
12 those felons.

13 THE COURT: Now you are talking about -- you are  
14 not talking about whether he should be sentenced under  
15 5010(b) or not. You are talking about the conditions  
16 that exist in Petersburg; is that right?

17 MR. HEADLEY: Yes.

18 THE COURT: All right.

19 MR. HEADLEY: It would also be my contention,  
20 your Honor, that these proceedings are de novo, and  
21 since the defendant has attained his 26th birthday, that  
22 your Honor should and must serve him as an adult there-  
23 by his maximum exposure would be one year.

24 The defendant by accident of age faced an  
25 additional period of time, the additional period of  
time cannot be justified on the basis of rehabilitative  
treatment received, because during the seven months of

1 incarceration, it cannot be said that cleaning hall- 10  
2 ways is rehabilitation.

3 THE COURT: Just a minute. Did you get that sheet  
4 in from the Court of Appeals?

5 MR. CLAYMAN: It's in the file, I believe.

6 THE COURT: Wait a minute. Is it in the file?  
7 When did he become 26?

8 MR. HEADLEY: He attained the age of 26 on June  
9 28th of this year.

10 THE COURT: June 28th. All right. Proceed.

11 MR. HEADLEY: Some of the advantages that have  
12 been advocated with respect to a conviction, with respect  
13 to the Youth Correction Act is expungment of his con-  
14 viction and has very little meaning for Mr. Torun,  
15 because he has been convicted once before.

16 THE COURT: Yes, he does have a record.

17 MR. HEADLEY: There has been no different treat-  
18 ment accorded Mr. Torun during his incarceration then  
19 he would receive as an adult, the only difference is  
20 that Mr. Torun will be incarcerated for a longer period  
21 of time.

22 The emphasis during Mr. Torun's incarceration  
23 has been on the severity of the crime and not on the  
24 conduct of Mr. Torun while incarcerated.

25 THE COURT: Why don't you let me read that? I

11  
1 can read it.

2 MR. HEADLEY: This is my own argument which I  
3 prepared, your Honor.

4 It is the defendant's contention that in light  
5 of the foregoing the defendant will not benefit from  
6 being sentenced under the Federal Youth Correction Act  
7 and that the defendant will benefit more by being  
8 allowed to return to his family and resume his business  
9 which is that of recycling.

10 His employer has a job waiting for him. As  
11 indicated by the agents this was a solitary instance  
12 of Mr. Torun's activity in the possession of cocaine --

13 THE COURT: Well, it's not a solitary offense;  
14 is it? I mean he committed other offenses. He has a  
15 record.

16 MR. HEADLEY: That's correct. That's correct,  
17 your Honor.

18 THE COURT: Solitary instance approach is some-  
19 thing beyond what you have here. When you make that  
20 argument you mean it's the first time that he's caught  
21 with drugs. That's what you're saying.

22 MR. HEADLEY: I understand it's the solitary  
23 instance of Mr. Torun's activity with respect to the  
24 possession of drugs.

25 THE COURT: Cocaine. Yes, but he has a record

1 also.

2 MR. HEADLEY: Yes, he does, Your Honor. We did  
3 not deny that.

4 THE COURT: Well. All right. Proceed.

5 MR. HEADLEY: The Probation Report indicates --  
6 and quite correctly -- that Mr. Torun's comments with  
7 respect to his activities and drugs, was one of boastful-  
8 ness rather than of fact.

9 It is my request that the defendant be sentenced  
10 as an adult.

11 I would like to add that I have in my possession  
12 from the United States Department of Justice a notice  
13 of action with respect to this defendant, Suat Torun.  
14 This notice --

15 THE COURT: What do you mean by notice of action?

16 MR. HEADLEY: Notice of action indicates the  
17 guidelines under which Mr. Torun will be eligible for  
18 parole. This notice indicates reasons, "Your offensive  
19 behavior has been rated as very high severity. You  
20 have a salient factor score of eight. You have been  
21 in custody in total of three months. Guidelines estab-  
22 lished by the Board of Youth cases, which considered the  
23 above factors indicate a range of 27 to 32 months to  
24 be served before release of cases, and this notice  
25 does indicate that Mr. Torun wouldn't in any event be

1 released between a period of some 27 to 32 months.

2 THE COURT: I think they said November, 1977,  
3 ine one of the reports, I heard.

4 MR. HEADLEY: It was when he would be considered,  
5 not when he would be released. They won't even talk to  
6 him until November of 1977. He will have to do 27  
7 to 32 months before he will be eligible for parole.  
8 In line with the decision of the Court of Appeals,  
9 they did not pass upon the constitutionality of the  
10 statute, but I would --

11 THE COURT: There are cases in which the  
12 statute has been attacked, and there are cases which  
13 have upheld the constitutionality of the statute under  
14 the circumstances.

15 MR. HEADLEY: If your Honor would refer to the  
16 slip decision, it does indicate that there are  
17 substantial constitutional questions that were raised  
18 here which they did not pass upon --

19 THE COURT: They didn't pass upon it, but there  
20 are cases which did. The Government cites Federal  
21 cases, two cases, I think United States v. Cruz, and  
22 United States v. Schwartz in support of its argument  
23 that a young adult offender may be sentenced under the  
24 Youth Corrections Act without an explicit findings of  
25 benefit. Cruz holds that a finding of no benefit is

1 not required before said defendant be sentenced as an  
2 adult. Schwartz reversed an adult sentence for a  
3 25-year-old because the sentence in the judge's comments  
4 are susceptible of the meaning that only a specific  
5 class of persons can claim consideration under the Act.  
6 They didn't pass on it.

7 MR. HEADLEY: Your Honor is not considering the  
8 benefit. I was addressing myself to the constitutional  
9 argument with respect to the fact that --

10 THE COURT: I understand your argument.

11 MR. HEADLEY: It is not up to Mr. Torun with  
12 respect to whether he gets out. That is taken away from  
13 him by virtue of the guidelines that are promulgated  
14 for him to be released. There is nothing he can do to  
15 be released now.

16 THE COURT: Of course you are not, Mr. -- what is  
17 your name?

18 MR. HEADLEY: My name is Mr. Headley, your Honor.

19 THE COURT: Didn't the defendant have someone  
20 else here before you? Who was here last time?

21 MR. HEADLEY: I was here on the last occasion.

22 THE COURT: I have this to say to you about these  
23 guidelines. I think they can be attacked as  
24 unconstitutional in all cases, because by and large  
25 good behavior should have some effect and if these are  
inflexible guidelines they may very well be subject

1 to a charge of unconstitutionality, not only with respect  
2 to anyone sentenced under the Youth Corrections Act,  
3 but in connection with anyone sentenced under any  
4 provision of the criminal code.

5 I, too, understand that, but I am not going to  
6 pass on it here. Go ahead. Are you finished with what  
7 you were saying?

8 MR. HEADLEY: I am not really requesting that you  
9 pass upon it here, but I want to raise these issues so  
10 that I may reserve them,

11 THE COURT: That's right. I want you to. I  
12 think it's great. Because what is happening here, as  
13 I see it, is that the judge does little sentencing, the  
14 Parole Board does all the sentencing and does not  
15 exercise any discretion as to release predicated upon  
16 good behavior, but just has an ironclad guideline which  
17 goes back, is retroactive in that the good behavior of  
18 the offender is no longer considered. If that is the  
19 effect of the guidelines, I think they are subject to  
20 attack. Go ahead.

21 MR. HEADLEY: This is my request: In light of  
22 the fact then of the guidelines in Forum eight months  
23 incarcerated for 19 months before he will be  
24 considered to be released --

25 THE COURT: Of course, that's not necessarily true

MR. HEADLEY: Your Honor, I have here --

10  
1 THE COURT: You listen a minute. If an applica-  
2 tion for reduction of sentence is made in ample time,  
3 the Court will always have a say on how long a man is  
4 going to stay in incarceration in spite of the  
5 guidelines.

6 MR. HEADLEY: I would hand up to your Honor, for  
7 his perusal, the notice of action with respect to the  
8 defendant. It indicates that the defendant will not be  
9 eligible for parole for 27 to 32 months.

10 THE COURT: I have read it. I guess you don't  
11 understand me.

12 MR. HEADLEY: I can make a motion for a reduction  
13 of sentence.

14 THE COURT: Just as an answer to your argument  
15 that this is absolute, it will not necessarily be  
16 granted if such a motion is made. It will be --

17 MR. HEADLEY: In answer of such a motion. This  
18 is absolute.

19 THE COURT: In answer of such a motion being  
20 granted, you are right that there is no guarantee.  
21 No question about that.

22 MR. HEADLEY: Your Honor, the defendant is now  
23 26. He stands before you. His mother is present here  
24 in court, and he had a substantial position prior to  
25 his period of incarceration. I am speaking -- requesting

1 that this defendant be sentenced as an adult. 17

2 THE COURT: All right.

3 MR. HEADLEY: I would like to add, Your Honor,  
4 that there can be no benefit which will be afforded this  
5 defendant by sentencing him as a youth; that he was  
6 engaged in the business of recycling, that opportunities,  
7 and those opportunities are not available for him. It  
8 seems that the Correction Facility in Petersburg has  
9 hobby-crafts --

10 THE COURT: Now you are repeating what you have  
11 already gone over. If you have something new I will  
12 listen to it. Don't repeat it.

13  
14 (continued next page)

15  
16  
17 BEST COPY AVAILABLE  
18  
19  
20  
21  
22  
23  
24  
25

1  
2 MR. HEADLEY: It seems with the opportunities  
3 that are available for him that there are none there  
4 in order to improve himself, and I would specifically  
5 request, your Honor, that he be sentenced as an adult.

6 THE COURT: Do you have anything to say?

7 MR. CLAYMAN: No, your Honor.

8 THE COURT: I have read this opinion and  
9 studied the opinion of the Court of Appeals, and have  
10 given it consideration, as serious consideration as  
11 is possible, and I have also studied the matter again  
12 with the Probation Department.

13 I have gone over the record of this defendant.  
14 I remember last time he was here I think he made an  
15 incorrect statement when I asked him whether he paid  
16 back that \$1,500, and he said, "Yes," and they found  
17 out that he hadn't. But that's only one thing.

18 This Court should never be in a position where  
19 it has any personal feeling about any defendant or that  
20 it has a feeling of -- I ought to say -- retribution  
21 of any kind.

22 Any judge that imposes a sentence under  
23 these kinds of conditions certainly indicates his  
24 inability or disqualification to be a judge. But I  
25 think this man does need more treatment. I definitely  
feel that way. I had his welfare in mind the first

1 time I imposed his sentence.

2 In the report -- from the second probation  
3 report, I think again after looking at his letter that  
4 he's written, and after I have read it it seems to  
5 indicate that this man does not want to accept any  
6 responsibility for his participation in this commission  
7 of this offense. Instead he wishes, to shift the  
8 blame somewhat on one of the agents, a man by the name  
9 of Kearns.

10 MR. HEADLEY: Your Honor --

11 THE COURT: Let me finish.

12 MR. HEADLEY: I am sorry, Your Honor.

13 THE COURT: I am going to do the sentencing.

14 MR. HEADLEY: I am sorry, Your Honor.

15 THE COURT: I am now, I have taken this up with  
16 the Probation Department, and I have read this letter,  
17 and I have also read this report, the progress report.  
18 It is true that he certainly has been free of any  
19 disciplinary infractions, but indeed this is the  
20 report which theoretically should not be before me  
21 when I am initially sentencing, and as far as the  
22 fact that this young man has become over the age of  
23 twenty-six in the interim, I don't think it should have  
24 anything to do with my sentencing, because I think  
25 this is a non pro tunc sentence.

1 Now, let me see, he has in here he's a young  
2 man, and in spite of what you say, because all defen-  
3 dant's lawyers naturally advocate a shorter sentence  
4 whether or not this is for the best interest of the  
5 defendant.

6 In spite of what you say, in my opinion after  
7 looking at his record and in looking at his approach,  
8 I think a sentence under the youth corrections act  
9 is advisable and would be very beneficial to him, and  
10 I think that after reading his letter and the progress  
11 report and the second report of the Probation Depart-  
12 ment, and after considering seriously the statements  
13 made in the Court of Appeals opinion, in all good  
14 conscience I am not going to sentence him as an adult.  
15 I am going to sentence him under the Youth Corrections  
16 Act because I think he needs it. So, Suat Cihan Torun,  
17 this case has been remanded for sentencing pursuant to  
18 an opinion of the Court of Appeals, Second Circuit,  
19 dated June 14, 1976, and also pursuant to 18 U.S.C.  
20 Section 4216, requiring specific findings as to why  
21 this Court felt that the defendant would benefit by  
22 a sentence under the Federal Youth Corrections Act,  
23 Section 5010(b) of Title 18 of the United States Code.

24 The Court felt at the time of sentencing and  
25 it feels now that the defendant should be sentenced

1 under 18 U.S.C. Section 5010(b) pursuant to its  
2 original sentence, and the reasons for the imposition  
3 of this sentence are as follows:

4 One, an examination of the probation report  
5 shows that while the defendant was never incarcerated,  
6 he was convicted of four prior offenses including two  
7 attempted grand larcenies, unauthorized use of a motor  
8 vehicle, and contempt of court.

9 Two, the probation report also indicates that  
10 while he purchased a junk and recycling business in  
11 May of 1975 for \$1500, he has not made any payments  
12 of the sums due.

13 Three, the probation report ends with a state-  
14 ment that unless the defendant develops some insight  
15 in relation with others he "may continue to act in an  
16 anti-social manner."

17 Four, while being charged only with possession  
18 of cocaine in violation of 21 U.S.C. Section 844(a),  
19 the probation report indicates that in actuality on  
20 May 20, 1974, the defendant sold to an undercover  
21 agent three ounces of cocaine for \$3300, from which  
22 he admitted his share was \$600.

23 Five, the defendant needs correctional treat-  
24 ment in the areas of drug abuse counselling and job  
25 skill development which can best be met in a

1 structured setting.

2 Six, the Federal Youth Corrections Act (FYCA)  
3 will permit him to be segregated from other offenders  
4 according to his needs for treatment and will protect  
5 him from the evil influence of older criminals.

6 Seven, the FYCA treatment will cure rather than  
7 accentuate the anti-social tendencies.

8 Eight, Upon the unconditional discharge by the Division  
9 before the expiration of the maximum sentence imposed,  
10 the conviction shall be automatically set aside and  
11 the Division shall issue a certificate to that effect.  
12 18 U.S.C. Sections 5021, 5017(a).

13 Nine, the FYCA at any time after reasonable  
14 notice to the Director may release conditionally the  
15 defendant under supervision.

16 Ten, release to the community at this time  
17 would depreciate the seriousness of the offense and  
18 thus be incompatible with the welfare of society.

19 Eleven, another member of the Sentencing Panel  
20 also recommended a sentence under 18 U.S.C. Section  
21 5010(b).

22 Therefore, I will resentence Mr. Torun as  
23 follows:

24 Suat Cihan Torun, on your plea of guilty to  
25 the one count of Information Number 75CR781, pursuant

1 to the provisions of Section 4216 of Title 18 of the  
2 United States Code, in lieu of a definite term, I  
3 sentence you to the custody of the Attorney General  
4 for treatment and supervision pursuant to the provi-  
5 sions of the Youth Corrections Act, Section 5010(b)  
6 of Title 18 of the United States Code, until discharged  
7 by the Youth Correction Division.

8 The sentence shall be deemed to have taken  
9 effect at the date of the original sentence. All right.

10 MR. HEADLEY: Your Honor, I just want to have  
11 Mr. Torun place one thing on the record.

12 THE COURT: Yes.

13 THE DEFENDANT: Your Honor, it's a fact that I  
14 do get in contact with persons older than myself. The  
15 range of thirty years and over. I would just like that  
16 to be on the record, because it has been changed on  
17 the institution to FCI only recently.

18 THE COURT: All right.

19  
20 \* \* \*